Contracts, Conditions, and the Clayton Act: Causes of Action Available to a Dealer Injured by an Exclusive-Dealing Arrangement

Michigan Law Review
Contracts, Conditions, and the Clayton Act: Causes of Action Available to a Dealer Injured by an Exclusive-Dealing Arrangement

I. INTRODUCTION

Although a seller may have many legitimate motives for engaging in exclusive-dealing arrangements1—arrangements in which the buyer agrees not to deal in goods of the seller's competitors—two anticompetitive results are unavoidable: foreclosure of channels of sale to competitors and limitation of the buyers' freedom of choice.2 With the express intent of advancing the public welfare through the preservation of free competition,3 the Congress of the United States enacted the Clayton Antitrust Act in 1914.4 Section 3 of this Act5 provides that it shall be unlawful (1) to make a sale or contract for sale (2) on the condition, agreement, or understanding that the

---

1. Presumably, a seller's primary motive for engaging in exclusive arrangements is to increase profits. Subsidiary motives may include desires to increase predictability, to utilize facilities more fully, to decrease overtime production and idle time, and to reduce inventory. Moreover, a seller may be able to eliminate cost incurred in the transfer of goods from one party to another through the use of exclusive arrangements. See Kessler & Stern, Competition, Contract and Vertical Integration, 69 YALE L.J. 1, 2-4 (1959).

2. A buyer's freedom of choice is limited by an agreement to deal exclusively with a particular seller even though he voluntarily agrees to it. He is bound by the agreement to the extent that, regardless of his future wishes, he cannot purchase products sold by competitors of the seller. Thus, if the buyer expands his sales facilities or increases his volume by advertising, he can sell only the seller's product to these additional customers. In contrast, the dealer who has entered an agreement for a specific quantity of merchandise may apply competitive products to the additional sales that were created by his increased efforts.

3. 51 CONG. REc. 9262 (1914) (remarks of Congressman McGillicuddy). Section 3 of the Clayton Act, 15 U.S.C. § 14 (1964), has been characterized as designed to promote horizontal competition both among those who seek distributive outlets and between buyers and sellers. These two rather specific policies have not been uniformly recognized. The ATTORNEY GENERAL NATL. COMM. ON ANTITRUST LAW, REPORT 136 (1955) intimates that a refused dealer should have a valid claim when his termination results from a defendant's pattern of selling exclusively to those who refrain from handling competitive goods. The Report attributes the fact that such suits have met with little success to a belief by the courts that § 3 is fundamentally designed to protect only the seller's competitors. More commonly, courts recognize the policy underlying the antitrust laws to be preservation of competition, a policy under which both narrower policies would qualify. See, e.g., United States v. Socony-Vacuum Co., 310 U.S. 150, 220-22 (1940); United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927).


5. Section 3 provides in part:
   It shall be unlawful for any person engaged in commerce . . . to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities . . . for use, consumption, or resale . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor . . . where the effect . . . may be to substantially lessen competition or tend to create a monopoly . . .

[ 1140 ]
purchasers not deal in the goods of a competitor of the seller \(^6\) (3) when the effect of such an agreement may be substantially to lessen competition or to tend to create a monopoly.\(^7\) Section 4 of the Clayton Act provides, as an important corollary to section 3, that private parties injured as a result of\(^8\) a violation of section 3 are entitled to bring suit for treble damages.\(^9\) Despite the apparent clarity of these statutory provisions, the determination of the exact nature of the rights vested in a party injured by an exclusive-dealing arrangement has consistently posed one of the most perplexing prob-

6. Section 3 applies whether the contract explicitly provides that the buyer shall deal exclusively with the seller or whether the agreement is a requirements contract designed to fulfill all the buyer's needs. Standard Oil Co. of California & Standard Stations, Inc. v. United States, 337 U.S. 293 (1949); Fashion Originator's Guild v. FTC, 312 U.S. 457 (1941); Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922). The section also encompasses tying agreements—agreements that condition the sale of one commodity on the purchase of another. See United States v. Loew's, Inc., 371 U.S. 58 (1963); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953); International Salt Co. v. United States, 332 U.S. 392 (1947); Morton Salt v. G.S. Suppiger, 314 U.S. 488 (1942).

7. This economic aspect of § 3 has received its basic interpretation in two Supreme Court decisions. In Standard Oil of California & Standard Stations, Inc. v. United States, 337 U.S. 293 (1949), the Court rejected a detailed economic analysis of the conditions surrounding the exclusive-dealing arrangement and held that this "clause of section 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected." 337 U.S. at 314. This decision sparked severe criticism by many who felt that the "quantitative substantiality" test was too mechanical for such a subtle and complex field. See, e.g., Bok, The Tampa Electric Case and the Problem of Exclusive Arrangements Under the Clayton Act, 1961 S. Cr. Rev. 257, 275-76. In 1961, the Court relaxed the vigor of the Standard Stations decision in Tampa Elec. Co. v. Nashville Co. 365 U.S. 320 (1961). In Tampa, the Court made the Standard Stations test a more flexible one that involves essentially a weighing of relevant factors. The Court considered "the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market areas, and the probable immediate and future effects which preemption of that share of the market might have on effective competition therein." 365 U.S. at 329. Moreover, the Court was willing to consider the legitimate needs that might be served by exclusive dealing. 365 U.S. at 327-29. See generally M. Handler, Antitrust in Perspective 29-48 (1957); Bodner, Antitrust Policy in Distribution: The Expanded Prohibitions Against Tying Arrangements and Exclusive Dealing: The Search for a Viable Legal Alternative, 37 A.B.A. ANTITRUST L.J. 759 (1968); Smith, Vertical Arrangements, 22 A.B.A. ANTITRUST SECTION 18 (1968); Stoll, Exclusive Dealing Arrangements and the Antitrust Laws, 6 WILLIAM & MARY L.J. 17 (1970).

Section 3 also requires that the integrating firm, the seller, be engaged in interstate commerce and that the products in question be wares, merchandise, machinery, supplies, or other commodities for use, consumption, or resale. These requirements are rarely litigated and are beyond the scope of this Comment.

8. The phrase "private parties injured as a result of" will be used in the early portions of this Comment to encompass anyone in the chain of causation. It will be shown later that damages are limited to those whose injury was "proximately" caused by defendant's violation. See pt. II. B. 2. infra.

9. Section 4 provides in part: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court . . . without respect to the amount in controversy, and shall recover treble damages by him sustained, and the cost of the suit, including a reasonable attorney's fees." 15 U.S.C. § 15 (1964) [hereinafter § 4].
lems in the federal antitrust laws. An example of the difficulties in this area is Allied Equipment Company v. Weber Engineered Products, Incorporated.

Allied Equipment Company (Allied), the plaintiff, was granted an exclusive distributorship in the farm equipment of Weber Engineered Products, Incorporated (Weber) for a large portion of Virginia, and between 1949 and 1953, Allied handled such products exclusively. During this period, relying upon an anticipated continuation of the business relationship, Allied incurred considerable expense in expanding wholesale facilities and establishing retail outlets for Weber equipment. In 1953, Allied notified Weber that it planned to handle competing lines in the future. Weber threatened to cancel the distributorship if such a plan were effectuated; when Allied refused to give up its intentions, Weber canceled the contract. Alleging that it had suffered damages because of an exclusive-dealing policy rendered illegal by section 3 of the Clayton Act, Allied brought a section 4 action. The Court of Appeals for the Fourth Circuit, however, declined to recognize a valid claim for which relief could be granted:

Allied faces a dilemma on the point. If there was no contract denying it the right to handle products competitive to Weber, there was no violation of the antitrust laws. If there was such a contract, as we have already pointed out the breach was by Allied and so no damages accrued to it.

Taken literally, the language of the court of appeals effectively denies a cause of action to any dealer injured by a violation of section 3.

Although an extreme example, the Allied decision fairly represents the unsympathetic treatment generally accorded dealers—particularly terminated dealers—in the area of exclusive dealing. While the excerpt from Allied stated that there must be a contract between the plaintiff and the defendant in order for there to be a

10. Kessler & Stern, supra note 1, at 21. The confusion has had important effects in other areas of the law. See, e.g., Macaulay, Changing a Continuing Relationship Between a Large Corporation and Those Who Deal with It: Automobile Manufacturers, Their Dealers and the Legal System, 1965 Wis. L. Rev. 483. In discussing the inequities that exist between small dealers and large manufacturers wielding coercive economic power, Professor Macaulay alludes to the fact that the use of private antitrust litigation to prevent such practices has met with little success. Id. at 506 n.70. Presumably, if private antitrust machinery could be utilized successfully, detailed and time-consuming efforts in other parts of the legal system would be unnecessary.

11. 237 F.2d 879 (4th Cir. 1956).

12. 237 F.2d at 883.

violation of section 3, the court failed to specify precisely what led it to find such a requirement. It is the purpose of this Comment to re-examine two of the three requirements of section 3 of the Clayton Act—with particular emphasis on the sale-or-contract-for-sale requirement—in an attempt to determine whether the formidable obstacle that judicial interpretation has made of these requirements is consistent with either the letter or spirit of the section. In discussing these requirements, this Comment will only consider the rights of parties who have at one time made purchases from a seller who utilizes exclusive-selling arrangements.

II. REQUIREMENT OF A SALE OR CONTRACT FOR SALE

In order to state a cause of action based on section 3 of the Clayton Act, a plaintiff must first allege that there has been a sale or contract for sale. In examining this requirement, it is useful to divide dealers who have been injured by exposure to exclusive-dealing arrangements into three categories according to the nature of the damages they seek. The first category consists of those dealers who at one time agreed to deal exclusively and who subsequently sue for the damages they incurred during the period of the illegal arrangement. The second category includes those dealers who refused to purchase the seller’s products exclusively and were subsequently exposed to the refusal-to-deal sanction for such conduct; these dealers allege damages resulting from their terminations. Finally, there is a hybrid group of dealers who qualify under both of the above categories and who seek damages for both acts of the seller. The cause of action in this third category is best considered in its component parts, although some problems peculiar to such a hybrid suit will be discussed separately. Since the rights of a dealer seeking damages resulting from his exclusive contract with a defendant-seller are relatively clear, that category will be considered only briefly and the bulk of analysis will focus on the more confusing area involving the terminated dealer.

14 The requirements are stated in text at notes 5-7 supra. The third, or economic, test is beyond the scope of this work. For a discussion of it, see note 7 supra and sources cited therein.

15 See notes 21-27 infra and accompanying text.

16 Competitors of the seller may also sue under § 4 for damage resulting from exclusive-dealing arrangements. 15 U.S.C. § 15 (1964). Although such suits are rare, the authority that exists seems clearly to establish the validity of a cause of action in these circumstances. See, e.g., McElhenney Co. v. Western Auto Supply Co., 269 F.2d 332 (4th Cir. 1959), cert. denied, 365 U.S. 834 (1960). Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955). Although a plaintiff-competitor faces the same § 3 and § 4 requirements as the terminated dealer, the competitor is in a somewhat better position because he alleges damage resulting from an existing contract or contracts between the defendant and distributors; the refused dealer, on the other hand, must argue that his injury resulted from a termination that was related to a system of exclusive-dealing arrangements. See pt. II. B. 2. infra. Thus, the competitor faces only
A. Dealer Who Sues for Damages Incurred During Period of Exclusive-Dealing Arrangement with the Defendant

The dealer who at some point in time acquiesced in the seller's unlawful scheme would appear to meet the requirements of section 3 since he seeks damages resulting from a contract or sale that was on the condition, agreement, or understanding that he deal exclusively in the seller's products. Such dealers can be divided into two groups. The first group offers the clearest example of a plaintiff who is obviously entitled to sue—a dealer who continues to adhere to the illegal sale agreement at the time of the suit. Not surprisingly, few dealers have been willing to institute proceedings under such circumstances. The scarcity of such suits may be attributed to a number of factors. For example, the integrated dealer may be satisfied with the arrangement. Or he may feel that, although not necessarily satisfied, he has suffered relatively little damage as a result of the agreement and that a lawsuit would therefore be economically infeasible. Finally, he may feel, though probably without cause, that a lawsuit would be barred by the seller's defense of in pari delicto.17

His principal difficulty lies in establishing proximate cause. The policy arguments that favor granting the refused dealer a cause of action, considered in text accompanying notes 61-87 infra, are generally applicable to the competitor as well.

Direct support for a competitor's cause of action under §§ 3 and 4 of the Clayton Act is found in the Karseal case, supra. Plaintiff Karseal was a manufacturer of an automobile wax known as "Wax Seal." Richfield was a producer of petroleum products distributed to a large number of dealers along with other automotive parts and accessories. Prior to this suit, Richfield had been found guilty of violating § 3 through the use of exclusive-dealing and tying arrangements in a suit brought by the Justice Department. United States v. Richfield Oil Corp., 99 F. Supp. 280 (S.D. Cal. 1951), aff'd per curiam, 343 U.S. 922 (1952). The plaintiff brought this suit for damages to his business resulting from one of the terms of the illegal agreements that prohibited dealers in Richfield products from purchasing automobile wax from competitors. The Court of Appeals for the Ninth Circuit stated the precise issue to be "whether Karseal's business is 'within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry.'" 221 F.2d at 362. The court first found that the gist of the violation was the restriction on the sale of competitive products. It then applied the target area theory of causation, discussed in notes 58-60 infra and accompanying text, and found that a competitor of the excluding manufacturer was not only hit but also specifically aimed at by the illegal conduct. 221 F.2d at 365.

17. The defense of in pari delicto has been considerably limited in antitrust suits. See Perma Life Mufflers, Inc. v. International Parts Corp., 390 U.S. 189 (1967); Banana Distribs. Inc. v. United Fruit Co., 162 F. Supp. 92, 45 (S.D.N.Y. 1958) (collecting authorities); Recent Development, 55 Minn. L. Rev. 827 (1969); Recent Development, 47 Texas L. Rev. 922 (1969). The courts have frequently disallowed the defense when it appears that the parties were not equally at fault. See, e.g., Harriman v. Northern Pac. Co., 197 U.S. 244 (1905) (seller used coercive tactics); Ring v. Spina, 148 F.2d 647 (2d Cir. 1945) (economic coercion); Lehmann Trading Corp. v. J & H Stolow, Inc., 184 F. Supp. 21 (S.D.N.Y. 1950) (seller used coercive tactics); Red Rock Bottlers, Inc. v. Red Rock Cola Co., 1953 Trade Cas. 68,856 (N.D. Ga.), rev'd on other grounds, 195 F.2d 406 (5th Cir. 1952) (one party appeared to have benefited more by
Nevertheless, those plaintiffs who have brought suit while dealing exclusively have easily fulfilled the procedural requirement\(^{18}\) of pleading a successful claim, since the contract required by section 3 is still in existence for all to observe.\(^{19}\)

For similar reasons, it would appear that a dealer in the second group—one who temporarily acquiesced in an exclusive-dealing arrangement and who, after changing his mind and refusing to continue to deal only with the seller, was subjected to the refusal-to-deal sanction—would also have a valid claim at least with respect to damages incurred during the period of the agreement’s operation.\(^{20}\) In this respect, he is in the same position as the dealer who is still engaged in such operations at the time of suit,\(^{21}\) hence some courts have recognized valid causes of action under these circumstances.\(^{22}\) However, other courts have refused to allow such a claim, either because of a failure to distinguish between the two separable portions of the illegal arrangement than the other party). The following statement from Ring is especially appropriate here:

> But here even without a showing of economic coercion . . . plaintiff is precisely the type of individual whom the Sherman Act seeks to protect from combinations fashioned by others and offered to such individual as the only feasible method by which he may do business. Considerations of public policy demand court intervention in behalf of such person, even if technically he could be considered in pari delicto.

148 F.2d at 653.

18. Throughout this Comment the "procedural requirement" will refer to the requirement that there be a sale or contract for sale in order to establish a cause of action under § 3 of the Clayton Act; the "substantive requirement" will refer to the necessity that there be a condition, agreement, or understanding. These terms have been selected because they best characterize the current plight of the refused dealer. Almost uniformly, failure to show the requisite contract or sale has resulted in the dismissal of a plaintiff’s case at the directed-verdict stage. See, e.g., Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953), discussed in pt. II. B. 1. infra. Thus, this requirement is labeled “procedural.” Failure to show the existence of a condition, agreement, or understanding, on the other hand, is generally considered a failure of proof, resulting in a verdict for the defendant. See, e.g., Timken Roller Bearing Co. v. FTC, 299 F.2d 839 (6th Cir. 1962) (discussed in text accompanying notes 119–20 infra). Thus, this element is more analogous to a substantive requirement.


of the claim or because of an apparent general animosity toward such suits. The decision in *Allied Equipment Company v. Weber Engineered Products*, 23 considered earlier, exemplifies both deficiencies. 24 Although the plaintiff in *Allied* claimed damage both before and after the termination, the court failed to discuss the two claims independently; it merely stated tersely that the plaintiff had no claim under any circumstances. 25 Another court strictly interpreted imprecise pleadings in denying a terminated dealer’s claim. *Campbell Distributing Company v. Jos. Schlitz Brewing Company* 26 involved facts similar to those in *Allied*—the plaintiff claimed that it had purchased beer exclusively from the defendant for over twenty years but was refused further purchases when it announced that it would no longer deal exclusively. The plaintiff alleged that it was injured as a result of the termination but failed to expand on the issue whether it had been damaged by the exclusive dealing for twenty years. Rather than examine the pleadings in an attempt to determine whether any claim had been presented by the facts alleged—in accordance with generally accepted procedure 27—or grant the plaintiff leave to amend, the court granted summary judgment for the defendant on the ground that a mere refusal to deal does not violate section 3. 28

Despite cases like *Allied* and *Campbell*, the sounder approach suggests that a dealer who once operated under an exclusive-dealing agreement but who has subsequently been canceled should at least have a valid claim with respect to damages incurred during the period of exclusive dealings. The mere fact that he was precluded from dealing with others during this period should provide sufficient proof of the fact of damage to defeat a motion for a directed verdict and allow the dealer to present the substance of his claim.

23. 237 F.2d 879 (4th Cir. 1956). See discussion in text accompanying notes 11 & 12 supra.
24. See also Hudson Sales Corp. v. Waldrip, 211 F.2d 268 (5th Cir.), cert. denied, 348 U.S. 821 (1954).
25. See text at note 12 supra.
27. See, e.g., Poller v. Columbia Broadcasting Sys., 368 U.S. 464, 473 (1960) ("[S]ummary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles . . . and hostile witnesses thicken the plot"); Conely v. Gibson, 355 U.S. 41 (1957); Bales v. Kansas City Star Co., 336 F.2d 439, 443 (8th Cir. 1964) ("[A] charge of antitrust violation, with claim of business injury therefrom, should generally be afforded the opportunity for proof to be made thereon, because of the aspect of public interest involved. Only where it is legally certain that the acts charged, in their rational implications, are incapable of constituting a violation of the antitrust laws [should the claim be dismissed]"); Clausen & Sons, Inc. v. Theo. Hamms Brewing Co., 284 F. Supp. 148, 153 (D.C. Minn. 1967) ("The general rule is that a claim should not be dismissed for insufficiency of statement unless it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proven in support of the claim").
In fact, most courts have been willing to recognize such a claim, and more recent cases indicate a marked trend in favor of the dealer. There is a more subtle factor, however, that may influence the outcome of such hybrid suits: a dealer in this situation may have incurred a substantial portion of his damages as a result of the refusal-to-deal sanction and therefore may fail to impress upon the court the significance of the minimal damages incurred as a result of a previously existing arrangement. The possibility that the harm caused by the termination may substantially exceed the harm caused by the exclusive agreement demonstrates the importance of determining whether the refused dealer has a valid claim for damages resulting from cancellation.

B. Dealer Who Sues for Damages Resulting from Termination for Failure To Consent to Exclusive-Dealing Arrangement

1. The Nelson Case

Courts have been reluctant to recognize valid causes of action for terminations for refusals to accede to exclusive arrangements. This reluctance is most clearly illustrated by the leading case of Nelson Radio & Supply Company v. Motorola, Incorporated. For several years prior to 1948, Nelson had been engaged in distributing Motorola products. During that year, Motorola submitted a wholesale distributor’s contract to Nelson that required it to stop selling the products of any Motorola competitors; Motorola threatened to terminate the present contract and to refuse to make a new one if Nelson did not agree to the exclusive arrangement. Nelson, however, resisted these demands and, in 1949, Motorola terminated dealings with it. Nelson then sued under the provisions of section 3 and alleged, inter alia, that Motorola had entered into agreements substantially similar to the one presented to Nelson with its other distributors throughout the United States; that had Nelson consented to these demands, it would have violated the antitrust laws; and that it was injured as a result of such actions. Nelson never enjoyed the opportunity of presenting the substance of its claim because the Fifth Circuit Court of Appeals, in a split decision, held that the plaintiff had failed to state a cause of action.

29. See, e.g., cases cited in note 22 supra.
30. 200 F.2d 911 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953).
32. The dissenting opinion of Rives, C.J., is instructive not only as a strong criticism of the court's action, but also as a premonition of future § 3 actions:

Taking the averments to be true, as we must on motion to dismiss, a scheme has been devised by defendant's agents under which its dealers throughout the country have been coerced into entering into contracts in restraint of trade and
reaching this conclusion, the court reasoned that section 3 prohibited contracts or sales on condition, agreement, or understanding. In the court's opinion, a dealer who had been subjected to the refusal-to-deal sanction had not been involved in a contract or sale within the meaning of section 3. Moreover, the allegation that defendant had entered similar arrangements with other distributors was of no relevance because, according to the court's interpretation of section 4, there was no proximate cause between such a course of conduct and plaintiff's injuries:

[I]t is obvious that any injury to plaintiff's business is in no way the result of any agreements restricting distributors in other territories. That is to say, it is the absence of a contract with the plaintiff, not the presence of agreements with distributors in other parts of the country, of which the plaintiff must complain.\(^{33}\)

_Nelson_ unfittingly became an important precedent for refusing causes of action to terminated dealers.\(^{34}\) Few courts were willing to challenge the reasoning in the opinion or to examine the case's somewhat unusual fact situation. Thus, the requirement that there be a sale or contract for sale proved to be a significant procedural barrier for private plaintiffs, and few suits reached the stage where it was necessary to prove the second, evidentiary portion of the section 3 test—a condition, agreement or understanding.\(^{35}\) Thus, it is clear that the sale-or-contract-for-sale requirement lies at the heart of the refused dealer's problem. Courts have frequently directed a verdict for the defendant, based upon an assertion that the sale-or-contract-for-sale requirement was not fulfilled, while failing to articulate their precise reason for so doing. As the _Nelson_ opinion indicates, there are two overlapping grounds on which such a decision can be based. On the one hand, a court may imply an additional
requirement into section 3—that the sale or contract for sale must be between the plaintiff and the defendant. Thus, under this theory, the terminated plaintiff cannot plead a valid cause of action because he has not dealt with the defendant during the time period for which he seeks damages. However, such an implication is inconsistent with both the letter—which requires merely "a sale or contract for sale" and not a sale or contract for sale involving the plaintiff—and spirit of section 3. Conversely, a court may interpret section 4 of the Clayton Act, which enables private plaintiffs to bring treble-damage actions, as requiring a causal relationship—i.e., a dealer can only be proximately harmed by a violation of section 3 if he was a party to a prohibited sale or contract for sale—that cannot possibly embrace the terminated dealer. The second interpretation is frequently difficult to distinguish from the first, since both focus upon the sale-or-contract-for-sale issue. Under the second interpretation, it is not relevant that the defendant is currently selling to other dealers on an exclusive basis and that the plaintiff was terminated for his refusal to join the arrangement because, as a matter of law, contracts with other dealers cannot proximately cause damage to the plaintiff.

If this latter issue is the true basis on which courts have denied causes of action to terminated dealers—and, indeed, it would appear to be more sensible to address the issue as one of causation—new concepts of proximate cause that have been developed in other areas of antitrust law should be examined. Moreover, useful analogies can be drawn from Sherman Act cases, because section 4 of the Clayton Act applies to both the Sherman and Clayton Acts. Thus, cases in which dealers sued for damages resulting from termination for failure to abide by resale price maintenance schemes or other arrangements in violation of section 1 of the Sherman Act should serve as

35. For a discussion of the "spirit" of § 3, see pt. II. B. 3. a. infra.
36. The Nelson court ultimately based its decision on causation. In dismissing the § 3 complaint, the court said, "The plaintiff has not been injured as a result of a contract, either express or implied, which sought to prevent him from dealing in the goods of any competitor of the defendant." 200 F.2d at 916 (emphasis added).
39. Section 1 of the Sherman Act provides in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 15 U.S.C. § 1 (1964). The possibility of suit under the monopoly provisions of § 2 of the Sherman Act, 15 U.S.C. § 2 (1964), is beyond the scope of this Comment.
forceful precedent for the exclusive-dealing situation, since plaintiffs in both situations should face an identical section 4 proximate-cause requirement.

2. Proximate Cause

Section 4 of the Clayton Act, which authorizes private antitrust suits and provides for treble damages to injured parties, has been interpreted as imposing a rather significant barrier for private litigants in the form of a threefold test. Although the section literally requires merely that the plaintiff “be injured in his business or property by reason of anything forbidden in the antitrust laws,” the courts have interpreted this language to include a rather stringent proximate-cause requirement in addition to the obvious requirements that there be a violation of the antitrust laws and that the plaintiff be injured. The effect of such an interpretation was apparent in Nelson, which appears to be the first case in the area of exclusive dealing in which a court was willing to direct a verdict on the grounds that a plaintiff had failed to allege a sufficient causal relationship between the violation by the defendant and the injury to the plaintiff.

The decision that an injury is or is not proximately caused merely represents a conclusion that the plaintiff should not be covered by the statute; stated another way, it involves a decision to break a possibly infinite chain of causation at some point. Therefore, it is more ap-

41. 15 U.S.C. § 15 (1964). Private litigants are also empowered to sue for an injunction against violations of the antitrust laws pursuant to § 16 of the Clayton Act, 15 U.S.C. § 26 (1964), but such an action would be, in a practical sense, of little value to the dealer in the situation under discussion. If the potential plaintiff is currently dealing exclusively with one seller, he is unlikely to sue, because he fears economic reprisal, because he has suffered little actual damage to date, or because he is satisfied with the arrangement. If the dealer has already been terminated for failure to cooperate in such a scheme, an injunction will not remedy that termination.


43. The following discussion is limited to the problem of alleging a sufficient causal connection between the alleged injury and the violation in order to establish a claim. To recover, a private litigant suing under the provisions of § 4 must also, however, prove pecuniary injury “in fact” to his business or property. See Pollack, Standing To Sue, Remoteness of Injury and the Passing on Doctrine, 32 A.B.A. ANTITRUST L.J. 5, 6-7 (1966).

44. Although Nelson appears to have been the first case in which a court delineated the relationship of proximate cause in § 3 violations, the proximate-cause requirement for private litigants suing pursuant to § 4 had existed for over sixty years. See Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910); Ames v. American Tel. & Tel. Co., 166 F. 820 (D. Mass. 1909). The requirement has been variously characterized as “proximate cause” and as “standing to sue.” See, e.g., Pollack, supra note 43: Note, Standing To Sue for Treble Damages Under Section 4 of the Clayton Act, 61 COLUM. L. REV. 570 (1961).

propriate to address the issue in terms of the policies underlying sections 3 and 4, rather than discussing the "closeness" or "remoteness" of an injury.\textsuperscript{46} Such an approach is particularly appropriate in the case of section 4, which speaks of causation in extremely broad terms.\textsuperscript{47} By imposing a stringent interpretation of cause, thereby eliminating the refused dealer as a plaintiff, the Nelson court implied an additional requirement into section 3 that severely limits that provision's scope.

It is unfitting that the analysis of proximate cause in the Nelson case has continued to have great judicial weight. For neither the Nelson decision nor many of the decisions that followed it have taken account of the elaborate body of law that has recently developed concerning proximate cause in the area of antitrust law.\textsuperscript{48} Moreover, the pleadings in the Nelson case were unusual, and the decision may be distinguished from similar cases. The court appeared to rely heavily on the broad language of the pleadings and the fact situation it seemed to represent. In trying to establish a causal connection between Motorola's over-all policy of exclusive dealing and the plaintiff's injury, the plaintiff, according to the court, merely alleged "that the defendant is selling and shipping Motorola merchandise to its other distributors throughout the United States under distributor agreements substantially the same"\textsuperscript{49} as the one that the defendant attempted to impose on the plaintiff. In response to this allegation, the court stated that "it is obvious that any injury to plaintiff's business is in no way the result of any agreements restricting distributors in other territories."\textsuperscript{50} Thus, it is possible that the indiscriminate wording of the complaint and the failure of the plaintiff to define more precisely the relationship between other dealers and itself led the court to the conclusion that there was no cause of action presented.


\textsuperscript{47} \textit{"Any person} who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . ." 15 \textit{U.S.C.} § 15 (1964) (emphasis added).


\textsuperscript{49} 200 F.2d 911, 913 (5th Cir. 1952) (emphasis added).

\textsuperscript{50} 200 F.2d at 915 (emphasis added).
Since the result in Nelson may be at least partially attributable to the plaintiff's defective pleading, it would be worthwhile to take a fresh look at the proximate-cause issue. Theoretically, cause should be relatively easy to establish in section 3 actions brought by terminated dealers. Consider a situation in which a plaintiff and three other dealers compete in the distribution of XYZ products in a market area that is highly profitable to XYZ Company. Each of the four dealers derives approximately seventy-five per cent of his profits from the distribution of XYZ products and twenty-five per cent from the distribution of products of a competitor of XYZ. Each of the plaintiff's three competitors then accedes to XYZ's demands to enter into exclusive-dealing arrangements, and XYZ threatens to terminate the plaintiff if he does not also acquiesce. The plaintiff is left with two choices: he may agree to the plan and lose the twenty-five per cent of his profits that is attributable to sales of non-XYZ products, or he may refuse to enter into the arrangement and thereby lose the seventy-five per cent of his profits that is attributable to sales of XYZ products. Thus, he is injured, in fact, by either alternative to the extent of lost profits. Proving proximate cause—that the injury to the plaintiff is proximately caused by the defendant's violation of section 3—requires only one additional conceptual step. Consider a hypothetical case similar to the one above, in which XYZ has four distributors of roughly equal size and seventy-five per cent of each distributor's sales consists of XYZ products. Dealer A is unlikely to be swayed by XYZ's threats of refusal to deal as long as dealers B, C, and D have not acceded, since he realizes that XYZ would lose one-fourth of its sales if it canceled A. For the same reason, XYZ is unlikely to cancel A. If B agrees to deal exclusively, however, it becomes more feasible for XYZ to threaten and cancel A, because B's increased efforts in handling XYZ's products will partially offset the losses incurred if A is terminated. When C and D acquiesce, XYZ will not hesitate to refuse to deal with A because the combined efforts of B, C, and D will probably make up for the lost sales formerly made by A. Thus, the sales or contracts to sell to other dealers directly harm the refused dealer, because they make it feasible for the seller to impose the refusal-to-deal sanction, which deprives the refused dealer of a large share of his profits. Passing from the realm of simple hypotheticals to the real economy does not alter the basic argument. It is not A's knowledge of XYZ's exclusive-dealing agreements with other distributors that is impor-

51. It is realistic to assume that in either situation, by stocking more inventory, specializing in fewer products, using more intensive advertising, etc., the dealer could increase sales of the products he is still selling above the level that prevailed for each item when he was handling several lines. However, it is unlikely that he could increase his total sales to the previous level, and even if he could, his profit level might be much less than previously.
tant: the mere existence of such agreements gives XYZ the economic leverage to threaten to cancel and ultimately to cancel A without inflicting substantial damage on itself. In sum, it can be seen that the harm resulting from a dealer's termination for refusing to accede to an exclusive-dealing arrangement is causally related to the seller's violation of section 3 by entering into exclusive agreements with other dealers.

That there is a close relationship between the terminated dealer's injury and the seller's section 3 violation is supported by a recent decision in a related area of antitrust law, in which the Supreme Court was willing to interpret the proximate-cause requirement of section 4 in a manner favorable to the refused dealer. In Simpson v. Union Oil Company, the plaintiff contended that he had been terminated by Union Oil for failure to abide by a resale price maintenance system abhorrent to section 1 of the Sherman Act, that leases and agreements that were conditioned upon the dealer's adherence to a price-fixing scheme were currently utilized by the defendant in its arrangements with numerous other dealers, and that the plaintiff was harmed as a result of his cancellation for refusal to adhere to the illegal arrangement. In reversing summary judgment granted for the defendant, the Court had little trouble finding proximate cause:

If the agreement achieves resale price maintenance in violation of the Sherman Act, it and the lease are being used to injure interstate commerce by depriving independent dealers of the exercise of free judgment. . . . The fact that a retailer can refuse to deal does not give the supplier immunity if the arrangement is one of those schemes condemned by the antitrust laws. There is actionable wrong whenever the restraint of trade or monopolistic practice has an impact on the market; and it matters not that the complainant may be only one merchant.

52. Indeed, the fact that knowledge is unimportant in the real world may easily be demonstrated by examining the classic model of the Prisoner's Dilemma. X and Y commit a crime to which there are no known witnesses. Immediately afterward they are captured and placed in two separate rooms. The district attorney tells X that if he confesses and thereby implicates Y, he will get a short sentence. However, if he does not confess but Y does, then Y will get the short sentence and X the long one. X now faces the dilemma. He knows that both he and Y will go free if neither confesses. He also knows, however, that the risk of silence is great, for if he refuses to confess but Y breaks down, he will get the worst possible sentence. X has no choice but to confess on the assumption that Y will confess, thereby minimizing his risk. The dealer offered an exclusive-dealing contract is in much the same position. He must assume that other dealers have acquiesced—unless the seller deals with so few buyers that the dealer can actually confirm his assumptions. Thus, the seller's threat is a viable one, and, for purposes of the effect on any one dealer, knowledge should be an unnecessary ingredient of a terminated dealer's § 3 action.

54. See note 39 supra.
55. 377 U.S. at 16.
It is thus clear that at least in the Sherman Act context of resale price maintenance, the Court will recognize a cause of action for a terminated dealer when the dealer alleges that his cancellation was part of a broader scheme designed to violate the antitrust laws. Since section 4 of the Clayton Act provides a private cause of action for injuries caused "by reason of anything forbidden by the antitrust laws," the same proximate-cause requirement should be applied to section 1 of the Sherman Act and section 3 of the Clayton Act. Therefore, the Simpson analysis should enable a dealer terminated for refusing to accede to an exclusive-dealing arrangement to state a valid cause of action under section 3.

Traditionally, when faced with a proximate-cause question in antitrust cases, the courts have used the "direct-indirect" test, which requires the plaintiff's injury to be the direct result of the defendant's violation rather than merely the indirect result of an injury to a third party. But since this test does no more than substitute "direct" for "proximate," it fails to simplify the inquiry. Because they regard the direct-indirect test as unsatisfactory, some courts have developed the "target area" test, which requires that a plaintiff be within the general target area at which the seller aimed his violation. Application of the target area test to a section 3 complaint by a terminated dealer might enable the dealer to plead a successful cause of action. The test in this context would involve a twofold inquiry. A court would first determine whether the harm to the plaintiff was of the type the relevant statute was designed to protect: in making this determination, the court would examine only the particular segment of the economy in which the exclusive-dealing arrangements exist. The second stage of the inquiry would involve an examination of the plaintiff's relationship with that segment in order to determine whether he was within the category of parties toward whom the violation was aimed. A refused dealer who alleges injury resulting from termination of his dealership as part of a series of successful exclusive-dealing contracts obviously would fulfill the first requirement of the test concerning the type of harm that the statute was designed to prevent. Moreover, by terminat-

---

56. See, e.g., Bookout v. Schine Chain Theatres, Inc., 223 F.2d 292 (2d Cir. 1955); Loeb v. Eastman Kodak Co., 183 F. 704 (2d Cir. 1910).
57. See Note, supra note 46, at 165.
58. See, e.g., Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955); Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51 (9th Cir. 1951), cert. denied, 342 U.S. 919 (1952); Pollack, supra note 45, at 18 (listing authority).
59. Note, supra note 46, at 165. In Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 362 (9th Cir. 1955), the court likened the test to a target: "Assuming Karseal [plaintiff] was 'hit' by the effect of the Richfield antitrust violations, was Karseal 'aimed at' with enough precision to entitle it to maintain a treble damage suit under the Clayton Act?" See also Recent Development, 104 U. PA. L. REV. 543 (1955).
ing dealers as a method of coercing others to comply with a policy of exclusive dealing, the seller has aimed his section 3 violations, in a very direct manner, at the refused dealer and thus has fulfilled the second portion of the test.

In reviewing the proximate-cause issue, it is clear that a terminated dealer's injury is causally related to a seller's violation of the exclusive-dealing prohibition in section 3 of the Clayton Act. The Supreme Court has recognized a similar causal relationship between a dealer's injury resulting from his termination for refusing to go along with a resale price maintenance scheme and a seller's illegal price maintenance arrangements with other dealers. Moreover, application of the target area test establishes the proximity between a terminated dealer's injury and a seller's illegal exclusive-dealing agreements with other dealers. It would therefore seem that unless a private cause of action under section 3 for terminated dealers is inconsistent with the antitrust-law policy, such a cause of action should be readily allowed.

3. A New Analysis

a. Policy Considerations. The target area test has thus far been ignored in the area of exclusive dealing in favor of a more vague proximate-cause standard. As a result, terminated dealers have been unable to maintain successful causes of action under section 3 of the Clayton Act. Because proximate cause is essentially a conclusory term used to justify a break made in the chain of causation for policy reasons, the policies that relate to granting a cause of action to refused dealers should be carefully examined.

Section 4B of the Clayton Act contains a four-year statute of limitations for actions brought under section 4 of the Act. A plaintiff in the position of Campbell Distributing Company, who had engaged in exclusive dealing for a long period of time prior to cancellation, loses a significant portion of his claim for damages unless he is willing and able to bring suit every four years. It has also been observed that several factors tend to deter a party to an exclusive-dealing agreement from suing during the course of the contract. However, section 3 of the Clayton Act deals specifically with the practice of exclusive dealing and indicates a strong congressional policy against such activity. It is therefore submitted that in order to effectuate this policy fully and to maximize the in terrorem enforcement effects of the section 4 treble-damage provision, a private litigant suing under section 3 should be able to seek redress for

---

61. See note 45 supra and accompanying text.
63. See text accompanying notes 26-28 supra.
64. See text preceding note 17 supra.
future damages resulting from his termination as well as for past damages incurred during the course of his dealing with the defendant.

The same policies that prompted adoption of a treble-damage remedy compel a broad interpretation of section 3. Section 4 was designed to provide for treble rather than single damages in order to induce private action and to make such suits a viable deterrent to violation of the antitrust laws. The courts have recognized such a policy and scholars have encouraged it. Moreover, the reasons for encouraging private litigation are convincing. First, government activity has long been hamstrung by insufficient funds and personnel. It has been estimated that it would require an increase of appropriations to the antitrust divisions of the Department of Justice and the Federal Trade Commission (FTC) of over four times their current budgets to equal the prevailing enforcement effectiveness of private litigants. In addition, private action has the advantage of involving highly interested and well-informed persons in the government's enforcement efforts; such participation is particularly important when evidentiary burdens are likely to be extreme. Finally, while private enforcement has a deterrent effect that is likely to be substantial when compared to that of government actions, which result in relatively small fines and, at times, ineffective in-

65. A. Neale, supra note 60, at 396.
66. For example, the Supreme Court, in Radovich v. National Football League, 352 U.S. 445, 453-54 (1957), stated: "Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practises as well as the public." See also Fanchon & Marco, Inc. v. Paramount Pictures, 100 F. Supp. 84, 88 (S.D. Cal. 1951), aff'd, 215 F.2d 167 (9th Cir. 1954), cert. denied, 348 U.S. 912 (1955), in which a district court said: "The treble-damage action was intended not merely to redress injury to an individual through the prohibited practices, but to aid in achieving the broad social object of the statute." More specifically, the treble recovery was designed to encourage private plaintiffs to bring suit, Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751-52 (1947); to threaten potential violators with punitive damages, Fanchon & Marco, supra; and to compensate those who have been injured by violations, Atlantic City Elec. Co. v. General Elec. Co., 226 F. Supp. 59, 61 (S.D.N.Y.), appeal denied per curiam, 337 F.2d 844 (2d Cir. 1964).
71. Loevinger, supra note 67, at 168-69.
junctions,72 private actions also aim partially at repairing the plaintiff's injury.

In light of such compelling factors,73 it is particularly anomalous that the narrow judicial interpretation typically given section 3 results in a great disparity between the causes of action available to the private plaintiff and the public plaintiff. Both the Justice Department74 and the FTC75 have realized a great degree of success in suits brought to enjoin the continuation of exclusive-dealing arrangements.

Thus, in United States v. Sun Oil Company,76 under circum-

72. See, e.g., United States v. Richfield Oil Corp., 99 F. Supp. 280 (S.D. Cal. 1951), affd. per curiam, 343 U.S. 922 (1952). In that case, after the court issued an injunction that prohibited exclusive dealing, the defendant increased the rent on its service stations while simultaneously lowering the price of its gas to distributors. As a result, dealers were effectively forced to purchase their full requirements of gasoline from the defendant. For an example of an equally anomalous result, see Dart Drug Corp. v. Parke, Davis & Co., 344 F.2d 175 (D.C. Cir. 1965). After the Justice Department had successfully prosecuted Parke, Davis for an illegal resale price maintenance system, United States v. Parke, Davis & Co., 302 U.S. 29 (1950), Dart Drug brought an action for treble damages alleging injury as a result of the refusal-to-deal sanction when it failed to acquiesce in Parke, Davis' scheme. The court of appeals held that Dart Drug did not have a cause of action because the defendant had merely exercised its right unilaterally to refuse to deal.

73. The policy considerations that favor a liberal interpretation of the statutes involved have often been countered with opposing policies. Some of the most common arguments are the danger of a flood of litigation (see Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910)); the drastic nature of the remedy itself (see Image & Sound Serv. Corp. v. Altec Serv. Corp., 148 F. Supp. 237, 239 (D. Mass. 1956)); the burden that might be placed on industries particularly susceptible to such actions (Harriton v. Paramount Pictures, Inc., 115 F. Supp. 312, 317 (E.D. Pa. 1953), affd., 211 F.2d 405 (3d Cir.), cert. denied, 348 U.S. 858 (1954)); and the possibility that a defendant will merely pass the cost of such recoveries on to the consumer. For a general discussion of the competing policy factors, see E. Timberlake, Federal Treble Damage Antitrust Actions §§ 3.01-02 (1985); Allito, The Economics of a Treble Damage Case, 52 A.B.A. Antitrust L.J. 87 (1966); Loevinger, Handling a Plaintiff's Antitrust Damage Suit, 4 Antitrust Bull. 29 (1959).


75. The Federal Trade Commission (FTC) possesses a particularly potent weapon in § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1964), because no contract to sell on condition, agreement, or understanding is required to establish a violation of that provision. Although § 5 merely requires proof of unfair methods of competition in order to establish a violation, it is directly analogous to § 3 cases because of the "incipiency doctrine" under which the courts have found § 5 to embrace the Sherman and Clayton Acts and hence to require proof identical to that necessary in those two acts. FTC v. Motion Picture Advertising Serv. Co., 344 U.S. 392 (1953). But cf. Kessler & Stern, supra note 70, at 65, suggesting a much broader interpretation of § 5.

stances almost identical to those in the *Nelson* case, a violation of section 3 was found. The defendant in *Sun Oil* was an integrated oil company that produced and sold gasoline to numerous independent dealers. As a matter of policy, the company refused to enter into a sales agreement unless the dealer orally or tacitly agreed to handle only the defendant's gasoline and sponsored products. At least one instance was cited by the plaintiff in which the sanction had in fact been applied. After examining the entire scheme, the District Court for the Eastern District of Pennsylvania found a clear violation of section 3 and issued an injunction. 77 Similarly, in *Butterick Company v. FTC*,78 the court upheld an FTC order compelling defendant manufacturer to cease and desist conduct that required dealers in its standard garment patterns to deal exclusively, which requirement was enforced through refusals to deal and threats of such refusals.79

It may be argued that the two categories of litigants can be distinguished on the basis of remedies—the government seeks an injunction while a private party seeks damages. Yet such a distinction is untenable because the crucial element—proximate cause—in reality is almost identical: the government alleges injury to the public in general as the basis of its claim, while the terminated dealer alleges injury to himself. Both claims, however, are dependent upon proof that the defendant and his distributors are illegally involved in exclusive dealing. There is no reason to hold that the injury to the general public is more "proximately" caused by this violation than is the injury to the terminated dealer since neither party is directly involved in the scheme. Indeed, injury to the terminated dealer seems more logically sustainable because the dealer's termination is a part of the seller's over-all scheme. This argument is bolstered by the treble-damages provision, which indicates a congressional policy to equate the public and private plaintiffs with regard to enforcement of section 3.80 Nevertheless, the *Nelson* court interpreted section 3 as applying different standards to different plaintiffs and thereby frustrated the policy of Congress.

Besides these specific arguments, it should be emphasized that the policy of antitrust law generally favors a more liberal view of

77. 176 F. Supp. at 739.
78. 4 F.2d 839 (2d Cir. 1925). See also *Timken Roller Bearing Co. v. FTC*, 299 F.2d 839 (6th Cir. 1962); *Carrier Carburetor Corp. v. FTC*, 112 F.2d 722 (8th Cir. 1949); *Fearsall Butter Co. v. FTC*, 292 F. 720 (7th Cir. 1929).
79. As both *Sun Oil* and *Butterick* suggest, it is often significant that a defendant in a § 3 suit used the threat of refusal to deal in order to obtain adherence to his unlawful arrangement.
80. See notes 65-67 supra and accompanying text.
the rights of a private plaintiff. In a comprehensive study of the policy of the antitrust laws, Kaysen and Turner have suggested that there are four possible alternative goals for antitrust policy based on past analysis and current needs: (1) performance, (2) limitation of the power of big business, (3) fair dealing, and (4) protection of competitive processes by limiting undue market power. Of the four goals, the authors chose the fourth—protection of competition—as the most desirable and feasible. If that choice is correct, it provides a strong case for granting a cause of action to the refused dealer. The case is further enhanced by the authors' definition of market power: "A firm possesses market power when it can behave persistently in a manner different from the behavior that a competitive market would enforce on a firm facing otherwise similar cost and demand situations." The refusal-to-deal sanction is not an effective means of power unless it is a meaningful threat. In order for the threat to be meaningful, the seller must have enough alternative sources of distribution available or enough dealers willing to cooperate so that he will not commit economic suicide by threatening the sanction on all his dealers. Thus, the very fact that he is able to refuse to deal with the plaintiff should present a prima facie case of market power. The same reasoning illustrates the harm that such conduct causes the competitive process: if the dealer acquiesces, harm to the competitive relationship between the seller and his competitors is implicit in the arrangement; on the other hand, if he refuses and is terminated while other dealers acquiesce, he becomes a cog in the seller's broader plan to achieve exclusive dealing, since his example makes the threat of termination more meaningful to others. Either result is equally harmful to the competitive process.

Even if protection of competition is not the paramount goal of antitrust policy, at least two of the other goals suggested by Kaysen and Turner—limitation on the power of big business and fair dealing—would favor upholding the refused dealer's case. By destroying the seller's ability to refuse to deal as a part of an exclusive dealing policy, a terminated dealer's private action under section 3 furthers the policy of limiting the power of big business. Moreover, the

82. Id. at 44.
83. Id. at 75.
84. The purposes of § 3 are viewed in a broader manner, thus strengthening the argument in favor of the refused dealer, in ATTORNEY GENERAL NAT'L COMM. ON ANTITRUST LAW, REPORT 190 (1955): "[C]ourts have viewed the Clayton Act's specific prohibitions [as] designed to prevent anticompetitive business practices which would result in unreasonable restraints."
85. The decision whether "big," as opposed to "small," business is involved in a particular case could be made by determining whether a violation of § 3 caused a "substantial lessening of competition" or tendency "to create a monopoly." See note 7 supra.
use of coercive tactics in an attempt to force unwilling parties to violate the law cannot reasonably be termed “fair dealing.” The final goal, performance, may, however, favor disallowing a cause of action. Although traditional economic theory teaches that the closer pure competition is approximated, the more performance and efficiency will be promoted, it is more realistic to assume that the predictability and stability provided by systems of exclusive-dealing contracts are more conducive to efficiency. Nevertheless, since the other basic goals of antitrust law—protection of competition, limitation of the power of big business, and fair dealing—would all be furthered by the allowance of causes of action for terminated dealers, it is clear that such claims have a strong basis in policy.

b. The Emerging Trend. The decision of the United States Court of Appeals for the Fourth Circuit in Nelson Radio & Supply Company v. Motorola was for years the principal authority relied upon by courts in denying causes of action to refused dealers. An explicit statement to the contrary has been offered only by the Sixth Circuit Court of Appeals, which has stood alone in consistently and unequivocally recognizing such a claim. However, recent decisions in several other circuits indicate a trend away from the Nelson logic and in favor of expanding the rights of terminated dealers. Even the Fourth Circuit, in the case of Amplex of Maryland v. Outboard Marine Corporation, has shown signs of moving toward the adaptation of a more flexible approach.

Amplex had dealt for several years in the outboard motors and accessories sold by Outboard Marine when it opened a branch store removed from its central location. When Amplex began selling a com-

87. Kessler & Stern, supra note 70, at 21. See also note 1 supra. For a comprehensive analysis of the role of efficiency in antitrust law, see Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, 75 YALE L.J. 373 (1966).
88. 200 F.2d 911 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953).
89. See Supra.
90. See Alles Corp. v. Senco Prods., Inc., 329 F.2d 567 (6th Cir. 1964); Englander Motors, Inc. v. Ford Motor Co., 267 F.2d 11 (6th Cir. 1959). In the Alles case, the plaintiff alleged that it had distributed the defendant's staplers pursuant to an agreement terminable by either party on sixty days notice. It also alleged that an implied term of the agreement was that the plaintiff would not sell products of the defendant's competitors. When the plaintiff began selling staplers produced by other manufacturers, the defendant threatened to terminate the distributorship agreement and ultimately exercised its option to do so. The court of appeals stated rather tersely that "the complaint states a cause of action under Section 3 of the Clayton Act." 329 F.2d at 570. The Englander Motors case gives a similarly brief treatment to the § 3 issue.
92. See also Osborn v. Sinclair Ref. Co., 286 F.2d 832 (4th Cir. 1960), petition for rehearing denied, 286 F.2d 832 (4th Cir. 1961), for a tying case in which the refused dealer was found to have a valid claim. But cf. McElhenney Co. v. Western Auto Supply Co., 269 F.2d 332 (4th Cir. 1959), cert. denied, 365 U.S. 834 (1960).
petitive line of motors in the branch, the defendant first threatened to cancel and then did cancel the plaintiff's distributorship. The Fourth Circuit affirmed the district court's dismissal under section 1 of the Sherman Act, but went on to discuss the ramifications of section 3 of the Clayton Act. The court found the cancellation in this case to be merely a unilateral refusal to deal. However, the court stressed the fact that the plaintiff had alleged only one such refusal and it implied that had the plaintiff shown that the termination of its dealership was part of an over-all policy of exclusive dealing with a number of dealers, achieved through coercive tactics, it would have demonstrated the existence of a valid case.

The Ninth Circuit also appears to be shifting from the Nelson position. In *Leo J. Meyberg Company v. Eureka Williams Corporation*, the plaintiff was allegedly terminated as a distributor of the defendant's vacuum cleaners because he refused to deal on an exclusive basis. In a per curiam opinion, the Ninth Circuit Court of Appeals affirmed the lower court's dismissal of the case. However, in the later case of *Lessig v. Tidewater*, the court indicated a change in its position. Lessig was a service station lessee and a dealer in the defendant's products. He operated under a contract, extensively used by the defendant, that required dealers to purchase all of their petroleum products from the Tidewater Oil Company. In his suit, Lessig alleged that periodic inspections of his inventory, threats of cancellation, and a system of rebates were used to insure the cooperation of the plaintiff and of other dealers involved in the exclusive-dealing arrangement and a system of resale price mainte-

93. The court stated:

Plaintiff's evidence, adduced and proffered, showed but one refusal by Outboard to deal upon a dealer's failure to drop a competitive line; that was the cancellation, or non-renewal, of plaintiff's own franchise; there was no evidence that the disenfranchisement of Amplex was held out threateningly as a deterrent to other dealers; there was no evidence of any combination or conspiracy linking Outboard to its competitors or other dealers . . . .

94. In an amicus brief, the Justice Department supported the plaintiff in its petition for certiorari. The Justice Department took the position that a refusal to deal is actionable by a private plaintiff when it has been used in an attempt to gain adherence to an exclusive-dealing arrangement that would, if agreed to, be merely one of a number of such contracts that could substantially lessen competition or tend to create a monopoly. Brief for the Justice Department as Amicus Curiae, Amplex of Maryland, Inc. v. Outboard Marine Corp., 389 U.S. 1036 (1968) (denying cert. to 380 F.2d 112 (4th Cir. 1967)).

95. 215 F.2d 100 (9th Cir. 1954).

96. The court observed, "Prior to July, 1952, the contract between the parties did not forbid appellant [plaintiff] to deal in products of a competitor of appellee. After July, 1952, there was no contract, lease or sale between the parties at all. It is manifest that there could be no violation of said section 3 by entering into an illegal lease, sale or contract." 215 F.2d at 101.

97. 327 F.2d 454 (9th Cir.), cert. denied, 377 U.S. 998 (1964).
inance and tying. Although not expressly overruling Leo J. Meyberg,98 the court cast doubt upon that case's continuing validity when it held:

The court's instructions conditioned recovery upon a finding that Lessig entered into an exclusive dealing or tying arrangement with Tidewater. But Lessig's charge was broader; he also alleged that Tidewater sought to impose these arrangements upon all his dealers. If Lessig proved damages to himself from such a course of conduct—for example, by cancellation of his lease and dealer contract because he refused to become a party to a system of illegal exclusive dealing and tying arrangements—we see no reason why he could not recover.

. . . Doubt has been raised that proximate cause can be shown where only the Clayton Act is offended, but we believe the distinction untenable. . . . Since it is the entire system of conditions and understandings which violates the Clayton Act, injury to a dealer resulting from Tidewater's efforts to establish and maintain that system is injury "by reason of" conduct forbidden by the Act.99

Thus, the Ninth Circuit seems to have recognized the possibility that a terminated dealer may be proximately injured by a system of exclusive contracts between the defendant-seller and other dealers. Although the district courts remain at odds,100 particularly in those jurisdictions where a case has not yet reached the appellate courts, it is apparent that the courts are becoming increasingly liberal in construing the requirements for a valid cause of action by a terminated dealer, particularly when the plaintiff can show that the refusal was not unilateral but part of a broader policy of exclusive dealing of the seller involving other dealers.

The Supreme Court indicated its concurrence with this trend in its recent decision in Albrecht v. Herald Company.101 Albrecht was a distributor of the defendant's newspapers whose dealership had been terminated for his failure to abide by a resale price maintenance scheme.102 Before resorting to termination, the defendant had

---

98. Rather than overrule Leo J. Meyberg, the court chose to distinguish it on the ground that plaintiff's claim in the latter case was narrower. Lessig alleged that defendant sought to impose these arrangements upon all of his dealers and that Lessig's cancellation was part of the over-all coercive conduct to effectuate the plan. 327 F.2d at 472.

99. 327 F.2d at 472-73 (footnotes omitted).

100. Compare Reliable Volkswagen Sales & Serv. Co., Inc. v. World-Wide Automobile Corp., 182 F. Supp. 412 (D.N.J. 1960) (court refused to grant summary judgment for the defendant on the ground that a terminated dealer was not embraced by §§ 3 and 4, although summary judgment was granted for the defendant when the plaintiff failed to show a substantial lessening of competition), with Campbell Distrib. Co. v. Jos. Schlitz Brewing Co., 208 F. Supp. 523 (D. Md. 1962) (no cause of action).


102. On the illegality of such schemes, see note 39 supra.
attempted to coerce the plaintiff into acquiescence by enlisting the aid of a salesman to solicit plaintiff's customers and of another dealer to deliver newspapers to those customers who were willing to discontinue their subscriptions with the plaintiff. The district court entered judgment for the defendant in the plaintiff's suit under section 1 of the Sherman Act, and the Eighth Circuit affirmed on the ground that plaintiff had failed to prove the existence of an illegal combination. In reversing, the Supreme Court first found the requisite combination to exist between the defendant and the salesman and other dealer. Significantly, it went on to say that the plaintiff could also have brought a successful suit by alleging injury as a result of the defendant's combination with other dealers based on the system of resale price maintenance agreements. By so stating, the Court presumably felt that the terminated dealer was indeed embraced by the proximate-cause requirement of section 4.

It should be apparent that recent cases involving exclusive dealing and analogous antitrust violations have reappraised the rights of the terminated dealer. Decisions in these cases have indicated a willingness to recognize a dealer's claim when his termination was part of an over-all plan of exclusive dealing involving other dealers. Implicit in such a rationale is a construction of the sale-or-contract-for-sale requirement of section 3 and the proximate-cause requirement of section 4 in a manner more consistent with the purposes of these sections.

III. REQUIREMENT OF A CONDITION, AGREEMENT, OR UNDERSTANDING

If he survives the procedural barrier of alleging a contract or sale, a private plaintiff ordinarily should have little difficulty establishing the requisite condition, agreement, or understanding that the purchasers not deal in the goods of a competitor of the seller. It has long been recognized by the federal courts that the condition, agreement, or understanding may be oral or tacit or merely implied from a course of conduct. The most common form of evidence is

103. The Supreme Court presented a unique discussion of the term "combination." Typically, a combination or conspiracy has involved competitors or intermediaries within the chain of distribution who benefited from the illegal scheme. See, e.g., United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944); FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922). But the Court in Albrecht held that it was irrelevant that the two other parties involved in the defendant's scheme had no interest in the arrangement—other than the economic benefits that accrued from performing their normal services—if they had been enlisted in the plan and had some knowledge of the defendant's purpose. 390 U.S. at 150.


105. See, e.g., Lessig v. Tidewater, 327 F.2d 459 (9th Cir.), cert. denied, 377
proof of coercion by the seller in imposing such terms in the sales agreement, and proof is not required that the dealer voluntarily acquiesced in the terms.\footnote{106} It matters not that the defendant used the ruse of agency consignment or other such contract, because the court will look to the substance and not the form of such arrangements.\footnote{107} It also appears to be clear from \textit{Albrecht v. Herald Company} that if the alleged agreement or understanding was made with third parties, it need not be shown that these other parties received any benefit from the illegal arrangement.\footnote{108}

It should be noted that section 3 may not require any oral, tacit, or other agreement concerning exclusive dealing between the parties, because section 3 declares illegal a contract or sale on the condition that the dealer not handle competitive goods. A condition is generally defined as "A future and uncertain event upon the happening of which is made to depend the existence of an obligation. . . ."\footnote{109} Prior to its fulfillment, a condition is a unilateral requirement imposed by the seller, and no acquiescence by the dealer is required in order to show its existence. Thus, the term has a very different substantive content from the terms "agreement" and "understanding," which denote bilateral conduct. Since section 3 of the Clayton Act was drafted to deal specifically with certain offenses that were not previously dealt with under the Sherman Act,\footnote{110} the unilateral quality of a condition becomes even more significant in

\footnotesize{U.S. 993 (1964); Alles Corp. v. Senco Prods., Inc., 329 F.2d 567 (6th Cir. 1964); United States v. Richfield Oil Corp., 99 F. Supp. 280 (S.D. Cal. 1951), \textit{aff'd}, \textit{per curiam}, 343 U.S. 922 (1952). In \textit{McElhenney Co. v. Western Auto Supply Co.}, 269 F.2d 332, 338 (4th Cir. 1959), the Fourth Circuit Court of Appeals observed: "Probably nothing is more firmly settled in our antitrust jurisprudence than that an illegal contract may be inferred from all the circumstances. . . [T]he [contract in question] could be supplemented by an extrinsic course of conduct from which the illegal condition or understanding might be found."

106. United States v. Sun Oil Co., 176 F. Supp. 715 (E.D. Pa. 1959). \textit{See also} McElhenney Co. v. Western Auto Supply Co., 269 F.2d 333 (4th Cir. 1959), in which the court said at 338: "It makes no difference whether this is voluntary or is imposed by coercion, but without such agreement, condition or understanding, there can be no statutory infraction."


108. 390 U.S. at 150.


110. The preamble to the original Clayton bill explained that its purpose was "to prohibit certain trade practices which . . . singly and in themselves are not covered by the [Sherman Act] . . ." A. Neale, \textit{The Antitrust Laws of the U.S.A.} 178 (2d ed. 1970).}
light of the fact that section 1 of the Sherman Act deals with bilateral action.\footnote{111} Thus, the terminated dealer in a typical case, such as Nelson,\footnote{112} should be able to argue successfully that, prior to termination, goods had been sold to him on the condition that he deal exclusively with the seller and that it was only after he accepted those goods and refused to abide by the accompanying condition that he was canceled. In this manner, the requirement of a sale on condition may be fulfilled and the plaintiff may allege a valid cause of action.\footnote{113} Since the precise issue has not yet arisen,\footnote{114} it is unclear whether the courts will interpret the term “condition” in this sense. In any event, a dealer who has been terminated pursuant to an exclusive-dealing scheme should encounter little difficulty establishing a condition, agreement, or understanding that purchasers not deal in the goods of the seller’s competitors.

Once the courts recognize a valid cause of action for terminated dealers under section 3 of the Clayton Act, it does not automatically follow that sellers will be stripped of their rights to exercise independent business discretion in choosing dealers or that sellers pestered by numerous small claims will be forced to settle essentially invalid claims. The doctrine of United States v. Colgate,\footnote{115} which gives the seller a right unilaterally to refuse to deal,\footnote{116} has been pre-

\footnote{112} See discussion in pt. II, B. 1. supra.
\footnote{113} Carried to its logical extreme, this argument concerning “condition” has much broader implications. Consider, for example, the framework established with respect to proximate cause in the text accompanying notes 51-52 supra. Assume that seller XYZ distributes its products through dealers A, B, and C. It was shown that as soon as A, B, or C acquiesced in an exclusive-dealing arrangement, another dealer who had been terminated could then establish proximate cause, regardless of whether he knew of the acquiescence. Use of the term “condition” in § 3, however, suggests that proximate cause can be established at an earlier stage of XYZ’s plan. Assume that XYZ makes simultaneous sales to A, B, and C on the condition that they deal exclusively with him. The condition is unilateral since A, B, and C do not agree to it. None of the three dealers abides by the condition, and XYZ thereafter refuses to deal with A. According to a literal interpretation of § 3, XYZ has thus violated the Act by making a sale on the condition that its distributors deal exclusively with it, even though none actually honored his wishes. Moreover, because termination of A was part of a plan to coerce B and C to acquiesce in the arrangement, A should be able to fulfill the proximate-cause requirement of § 4 and recover damages for his termination.

\footnote{114} The closest a court has come to isolating the three terms was in Lessig v. Tidewater, 327 F.2d 459 (9th Cir.), cert. denied, 377 U.S. 993 (1964), in which the court of appeals briefly spoke solely in terms of “condition.” 327 F.2d at 465, 468.
\footnote{115} 250 U.S. 300 (1919).

\footnote{116} The Court there held: “In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.” 250 U.S. at 307.
served, although in a modified form.\textsuperscript{117} It has even been suggested that the very reason for preserving the \textit{Colgate} doctrine is to provide the lower courts with a tool for dismissing frivolous treble-damage actions.\textsuperscript{118} In any event, proof of a "condition, agreement or understanding" is an evidentiary requirement that serves exactly the same purpose—preserving the right of sellers to refuse to deal for reasons that do not violate the antitrust laws. Such a right is illustrated in \textit{Timken Roller Bearing Company v. FTC}.\textsuperscript{119} In that case, defendant Timken engaged in a policy of urging dealers to show loyalty by devoting themselves primarily to the resale of Timken bearings. The plaintiff testified that he had been terminated because he dealt in competitive products. However, other dealers testified that they felt free to deal in competitive goods and actually did so. Since no condition, agreement, or understanding had been

\textsuperscript{117} The sweeping language of \textit{Colgate} was modified by a series of subsequent decisions: United States v. Schrader's Son, Inc., 252 U.S. 85 (1919); Frey & Son, Inc. v. Cudahy Packing Co., 256 U.S. 208 (1920); FTC v. Beech-Nut Packing Co., 237 U.S. 441 (1919); United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944). However, the crowning blow was not delivered until United States v. Parke, Davis & Co., 362 U.S. 29 (1959). In that case, Parke, Davis engaged in an active program of maintaining resale prices of retailers and utilized a variety of tactics. It published a catalogue with "suggested" retail prices. Retailers and wholesalers were orally induced to abide by such prices and were encouraged to report violators. The most potent economic weapon utilized by Parke, Davis, according to the Court, was the threat of refusal to deal with either retailers who failed to observe the suggested minimum prices or wholesalers who deal with such dealers. 362 U.S. at 45-46. While cautiously avoiding expressly overruling \textit{Colgate}, the Court found a violation of § 1 of the Sherman Act, because it concluded that Parke, Davis had gone beyond a mere unilateral refusal to deal and had applied tactics that effectuated adherence to its illegal policies and resulted in a combination between it and the wholesalers. 362 U.S. at 46-47. In other words, when a seller, in a totally isolated case or a series of isolated cases, refuses to deal with a distributor for any reason, \textit{Colgate} protects his independent discretion from prosecution under the antitrust laws. But the Court indicated that a seller is subject to prosecution when he uses the threat of refusal to deal as a method of assuring compliance to a scheme violative of the antitrust laws and as a result suppresses competition. 362 U.S. at 47.

The Parke, Davis decision and previous decisions have produced a substantial controversy whether \textit{Colgate} retains any significance today. See, e.g., Adams-Mitchell Co. v. Cambridge Distrib. Co., 189 F.2d 915, 917 (2d Cir. 1951) (dissenting opinion arguing that if \textit{Colgate} is not already overruled, it should be); Pitofsky & Dam, \textit{Is the Colgate Doctrine Dead?}, 57 A.B.A. ANTITRUST L.J. 772 (1966); Note, \textit{Unilateral Refusals to Deal: King Colgate is Dead!}, 50 St. L.J., 557 (1966). But cf. Fulda, \textit{Individual Refusal To Deal: When Does Single Firm Conduct Become Vertical Restraint?}, 39 LAW & CONTEMP. PROB. 590 (1966); Turner, \textit{The Definition of Agreement Under the Sherman Act: Concuss Parallelism and Refusals To Deal}, 75 HARV. L. REV. 655 (1962); Weisbard, \textit{Resale Price Maintenance, Exclusive Dealing and Tying Arrangements}, 10 ANTITRUST BULL. 341 (1965). But regardless of the theoretical debate concerning its significance, the \textit{Colgate} doctrine continues to be applied by the courts today, particularly in the area of exclusive dealing. Pitofsky & Dam, \textit{supra} at 782-83. See, e.g., Timken Roller Bearing Co. v. FTC, 299 F.2d 839 (6th Cir. 1962); McElhenny Co. v. Western Auto Supply Co., 269 F.2d 332 (4th Cir. 1959), cert. denied, 365 U.S. 834 (1960); Nelson Radio & Supply Co. v. Motorola, 200 F.2d 911 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953).

\textsuperscript{118} Turner, \textit{The Definition of Agreement Under the Sherman Act: Concuss Parallelism and Refusals To Deal}, 75 HARV. L. REV. 655 (1962).

\textsuperscript{119} 299 F.2d 839 (6th Cir. 1962). See also United States v. J.I. Case Co., 101 F. Supp. 856 (D. Minn. 1951).
shown, the court affirmed a verdict that was entered in defendant's favor on the ground that "a seller has the right to select his own customers."120

IV. AN ALTERNATIVE: THE SHERMAN ACT

The preceding discussion sought to show that a private plaintiff, injured as a result of an exclusive-dealing arrangement, should be able to seek redress under section 3 of the Clayton Act. Alternative theories of relief, however, may be suggested. The most likely possibility would be suit under section 1 of the Sherman Act.121 That section declares contracts, combinations, and conspiracies in restraint of trade to be illegal. The same policy arguments that favor granting a cause of action to terminated dealers for violations of section 3 of the Clayton Act—such as protection of competition and inducement of private suits to deter antitrust violations—support the allowance of similar claims under section 1 of the Sherman Act.122 The similarity between the two sections is further reflected by the fact that private litigants suing pursuant to section 3 have usually also alleged violations of section 1. Similarly, when no violation of the Clayton Act provision is found, because the requirement of a sale on condition is not present, the courts have refused to find a violation of the Sherman Act on the ground that no contract, combination, or conspiracy exists.123

While exclusive-dealing arrangements may be found to violate either section 1 of the Sherman Act124 or section 3 of the Clayton Act, offenses under the different provisions involve different procedural and substantive factors. Moreover, even when identical considerations would appear to be involved, as in the case of the causation requirement under section 4 of the Clayton Act, the courts have

120. 299 F.2d at 842.
121. 15 U.S.C. § 1 (1964). Section 2 of the Sherman Act, 15 U.S.C. § 2 (1964), will not be considered since, although available, it is based on monopoly power that results from vertical integration rather than exclusive dealing per se.

More radical and less feasible suggestions have also been made. For a discussion of the advantages and disadvantages of reading the words "offer" or "attempt" into § 3 of the Clayton Act or of amending the statute itself, see Kessler & Stern, supra note 70, at 114-16. See also Englander Motors, Inc. v. Ford Motor Co., 267 F.2d 11, 15 (6th Cir. 1959), in which the Sixth Circuit Court of Appeals indicated a willingness to read "attempt" into § 3. In that case, a terminated dealer was held to have stated a valid claim against a defendant who used short-term cancellation provisions as a means of coercing compliance to exclusive-dealing arrangements.

122. See notes 61-72 supra and accompanying text.
frequently applied different standards to cases brought under the respective acts. For example, under either act, a private litigant is given standing to sue by section 4 of the Clayton Act. Yet the courts have inexplicably tended to be much more liberal in finding proximate cause when a Sherman Act offense, such as resale price maintenance, is involved.125 It is possible that such liberality will be extended to the area of exclusive dealing and thus improve the plight of the terminated dealer.

One of the significant distinctions in the nature of the exclusive-dealing offense under the two acts lies in what has been called the substantive, or economic, test. An exclusive arrangement is illegal under section 3 whenever a not insubstantial amount of commerce in the product is involved or when the seller's economic power with respect to the exclusive product is sufficient to produce an appreciable restraint on trade.126 To satisfy the economic test under the Sherman Act, on the other hand, the Supreme Court has ruled that both elements must be present.127 Nevertheless, since the dual requirements were first promulgated, the Court has gradually lessened the market power requirement through a series of Sherman Act decisions culminating in Fortner Enterprises, Incorporated v. United States Steel Corporation.128 In Fortner, a case involving an illegal tie-in of the purchase of prefabricated houses for the development of two tracts of land and the financing of the purchase, the Court suggested that it might be willing to eliminate the market power criterion in section 1 cases.129 Several lower-court decisions have also indicated a willingness to apply the Clayton Act economic test to cases arising under section 1 of the Sherman Act.130 If such a trend continues, the substantive burden of bringing suit under section 1 of the Sherman Act will be alleviated and the refused dealer may find that section 1 provides a more desirable route for his claim than does section 3 of the Clayton Act.

126. See note 7 supra.
129. 394 U.S. at 499-501. See also Handler, supra note 128, at 168.
130. See, e.g., Advance Business Sys. Supply Co. v. S.C.M. Corp., 415 F.2d 55, 62 (4th Cir. 1969), in which the court said: "[A] seller's successful imposition of a tying arrangement on a substantial amount of commerce may be taken as proof of his economic power over the tying product;" Seigal v. Chicken Delight, Inc., 1970 Trade Cas. 88,505, 88,508 (N.D. Cal. 1970), in which the court said: "[T]his court is of the opinion that any distinction between the Sherman Act and Clayton Act with regard to the question of market power is wholly artificial."
Although the economic test may be more difficult under section I, the other elements of a section I claim should be much easier for a plaintiff to establish than the elements of a claim under section III. In order to show that a violation of section III has occurred, a plaintiff must prove the existence of a sale or contract to sell and of a condition, agreement, or understanding. Under section I of the Sherman Act, the plaintiff need only establish the presence of a contract, conspiracy, or combination. The terms "combination" or "conspiracy" in section I significantly enhance a plaintiff's chances of pleading a valid claim, since the Supreme Court has long recognized the possibility of a vertical-horizontal combination or conspiracy between a seller and other dealers and, in recent years, has expanded the scope of these two terms.

Although the section I cause of action would present significant advantages to the refused dealer in establishing his claim, one important disadvantage should be noted. Section III of the Clayton Act declares illegal a sale or contract to sell. Thus, by utilizing the sales to other dealers as a basis for the violation, the refused dealer establishes a claim against the seller only; other dealers are not liable, since they merely bought or contracted to buy. Since no similar restriction exists in section I of the Sherman Act, a refused dealer would be able to sue other dealers as well as the seller. Although this result might technically further the policy of the law against exclusive dealing, it would appear to be an overly harsh measure in the typical situation where the other dealers were coerced into an exclusive-buying arrangement. This very problem may have influenced the courts in disallowing claims to terminated dealers pursuant to section I, although such reasoning is not apparent from the cases. It would appear, however, that when the ultimate decision is faced, construction of a judicial doctrine under section I of the Sherman Act that does or does not encompass the acquiescing dealer in the range of liability must depend upon the availability of section III of the Clayton Act as a more specific alternative and a weighing of the policies and equities involved in the particular section I suit.

---

131. Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939). The vertical-horizontal combination or conspiracy has not yet been recognized in the area of exclusive dealing, however. Similarly, the courts have been unwilling to grant a cause of action to the refused dealer on the basis of a group boycott theory. The group boycott theory would be a useful one for plaintiffs, because a group boycott is a per se violation of the antitrust laws. Barber, Refusals To Deal under the Antitrust Laws, 103 U. Pa. L. Rev. 847, 872-77 (1955).


133. A device that would avoid implicating other dealers, while establishing a violation by the seller, might be the expanding doctrine of intracorporate conspiracy. It is well established that a conspiracy can be found when one part of a corporate
V. Conclusion

Regardless of the applicability of section 1 of the Sherman Act to private remedies for exclusive dealing, it is the thrust of this Comment that terminated dealers should be granted a cause of action under section 3 of the Clayton Act. In reaching this conclusion, it was shown that section 4 of the Clayton Act encourages private plaintiffs to enforce the antitrust laws when they have incurred injury as a result of a forbidden act. But although the federal government has consistently succeeded in prosecuting sellers for violating the provisions of section 3 by written, oral, or tacit exclusive agreements, the interpretation given sections 3 and 4 in Nelson and many subsequent decisions has permitted sellers to employ the refusal-to-deal sanction—a very effective sort of power—to violate the antitrust laws while remaining immune from section 4 suits. Such an interpretation is not only contrary to the policy behind sections 3 and 4 and the antitrust laws in general, but it also creates an obvious inconsistency in enforcement of the law.

Section 5 does not expressly require that the sale or contract to

family conspires with another—for example, a conspiracy between a parent corporation and a wholly owned subsidiary. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951); United States v. General Motors Corp., 121 F.2d 376 (7th Cir.), cert. denied, 314 U.S. 618 (1941). However, due to the infrequent appearance of such corporate structures in the area of exclusive dealing, such a doctrine provides little help to the refused dealer.

A related theory that might be helpful to the refused dealer involves the concept of a conspiracy formed among the officers and the corporation itself. The Fourth Circuit Court of Appeals in the Nelson case found this theory to be "absurd": "It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual, and it is the general rule that the acts of an agent are the acts of a corporation." 200 F.2d 911, 914 (5th Cir. 1952). It has been suggested, however, that the doctrine of respondeat superior can be applied to establish the conspiracy. Under this line of reasoning, each corporate officer involved in the establishment of exclusive agreements is responsible, as an individual, for his acts. Moreover, such activity is attributable to the corporation as well, because it is responsible for the acts of its agents. Hence, when a corporation and its officers embark on an exclusive-dealing program, the corporation may be held for conspiracy in restraint of trade. Kessler & Stern, supra note 70, at 88-89. At least two countervailing arguments have thus far been successfully applied to prevent this analysis. First, a doctrine of intracorporate conspiracy would effectively replace § 1 with a naked restraint-of-trade doctrine. See Note, Dealer Recovery for Unreasonable Refusals To Deal Under Section 1 of the Sherman Act, 53 CORNELL L. REV. 729, 738 (1968). And second, the proposed doctrine would usurp the function of § 2 of the Sherman Act, 15 U.S.C. § 2 (1964), which was drafted specifically to deal with such restraints.

...
sell on a condition, agreement, or understanding be with any specific party. Yet by finding that proximate cause is not fulfilled unless the arrangement involves the plaintiff, the Nelson court effectively read such a requirement into the Clayton Act and thereby seriously limited the efficacy of the exclusive-dealing prohibition. It is submitted that a plaintiff should not be required to show that he was a party to a sale or contract to sell in order to establish a valid cause of action, as long as the actions directed toward the plaintiff were part of an over-all policy of exclusive dealing. Similarly, it should be unnecessary for the plaintiff to show that he was aware of the cooperation of other dealers. To state a valid claim, the plaintiff should only be required to show that one other dealer was, in fact, involved in the scheme. The courts are beginning to recognize that allowing the refused dealer a comprehensive cause of action is consistent with the basic antitrust policies of protecting competition, competitors, and the discretion of individual dealers. Such interpretation is likely to be expanded, particularly in light of recent Supreme Court decisions in related areas. Yet the increased liberality accorded the terminated dealer will not destroy the right of a seller independently to exercise sound business discretion, because this right is safeguarded by the necessity of proving an illegal condition, agreement, or understanding and by the Colgate doctrine. In sum, by fully utilizing section 3 of the Clayton Act as a basis for private causes of action, the courts could implement the policy of the antitrust laws and provide remedies for terminated dealers injured by illegal exclusive-dealing arrangements while not unduly infringing the freedom of manufacturers and distributors.

136. See notes 115-18 supra and accompanying text.